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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 562

ABE PLISCO,
NORMAN R. BAKER,
PERCY M. MAY,
Petitioners

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No.

ABE PLISCO,
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PERCY M. MAY,

Petitioners

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Abe Plisco, Percy M. May, and Norman R. Baker, respectfully pray for writ of certiorari to review the decision and judgment of the United States Court of Appeals for the District of Columbia, entered on July 30, 1962, affirming the judgment of the District Court of the United States for the District of Columbia.

THE OPINION BELOW

The opinion of the United States District Court of Appeals for the District of Columbia has not yet been reported. The opinion has been printed in the Appendix.

JURISDICTION

Jurisdiction to issue the writ is found in the provisions of Section 240 (a) of the Judicial Code (28 U.S.C.A., Sec. 1254 (1).

QUESTION PRESENTED

Whether it was error for the Court to allow the Commissioner to accept the "wins" from the records of the Defendants and disregard entirely the "losses" when the "wins" were part and parcel of records showing "losses".

STATEMENT OF THE CASE

On June 28, 1962, a divided panel of the United States Court of Appeals for the District of Columbia affirmed judgments against appellants in the following amounts: against Plisco the sum of $614,551.46, against May the sum of $497,437.99, against Baker the sum of $474,397.38. The said judgments were based on a suit by the United States to reduce to judgment a jeopardy assessment resulting from the disallowance by the Commissioner of Internal Revenue of certain losses appellants claimed on their 1948, 1949 and 1950 income tax returns. On July 30, 1962 the full Court of the United States Court of Appeals for the District of Columbia by a six to three (6-3) decision denied appellants Petition For Rehearing In Banc.

The majority of the division which heard these appeals stated the facts as follows:

Appellants were partners in a gambling enterprise. They computed each day's net profit or loss by subtracting the pay-outs and expenses from the day's winnings and recorded the result on their books. The Commissioner rejected the loss day figures, characterizing them as "self-serving," but accepted the daily profit figures as admissions against interest.

Unable to collect more than a fraction of the assessment by distraint, the Government brought this suit in the District Court to reduce the unpaid portion to judgment before it expired. At trial, the parties stipulated that the Commissioner had made deficiency assessments for the years in question here. Appellants sought to introduce the daily

records described above, but they were excluded on the Government's objection. Since assessments are deemed prima facie correct, and since appellants offered no other rebutting evidence, the Court rendered judgment for the Government. The taxpayers appealed.

The majority then ruled: "We think the judgment must be affirmed. In reaching that result, we assume without deciding that the taxpayers' records were admissible as past recollections recorded since appellant May testified that he posted the entries daily and that they accurately reflected the day's operations. We also assume that appellants' failure to urge this ground of admissibility below does not bar consideration here," and further stated, "We think, however, that since appellants had no incentive to overstate their daily profit figures in order to increase their taxes, the Commissioner could reasonably accept these figures as minima. On the other hand, since appellants did have an incentive to overstate their daily loss figures in order to reduce their taxes, the Commissioner could reasonably reject these figures in the absence of any data which would provide a basis for testing their reasonableness."

The majority also stated that the appellants might have rebutted the Commissioner's computation by reconstructing their own income by the net worth method. Appellants urged to the Court that by May's testimony and the records, the prima facie case of the Commissioner was overcome and the Commissioner could then introduce evidence of net worth to substantiate his assessment but he did not because he had no such evidence.

Judge Fahy dissenting stated:

"There is no satisfactory evidence that these men owe these large sums to the United States, and so I cannot agree to affirm the judgments."

"It is no doubt true that appellants failed to maintain adequate records; but the cases before us are not for viola-

for violation of the gambling laws. The question is whether appellants owe the United States the amounts of the judgments.

"I think the United States may not thus choose and reject from the same records. The parts chosen have no more trustworthiness than the parts rejected.

"I also think it is inaccurate to say that the assessments result from the disallowance of alleged gambling losses which were not substantiated. This is not the situation. The assessments result from taking these taxpayers' own records, accepting completely the wins shown thereby and disregarding entirely the losses, except losses accounted for by the taxpayers in reaching net wins. This is to me indeed an unreliable and arbitrary method by which to obtain these judgments. The method shown to have been used destroys the prima facie correctness of the result."

"The majority opinion itself states the records referred to "do not 'clearly reflect income' within the meaning of Int. Rev. Code of 1954 #446 (b) . . . the records reflect nothing more than the taxpayers' naked conclusions concerning the net taxable income or loss resulting from each day operations. The Commissioner was not required to accept them." Yet the Commissioner did not disregard them. These very records are the sole basis for the amounts of the assessments. The majority opinion somehow seeks to overcome this difficulty by accepting the wins shown by these unacceptable records, as if they show the income, relying on the theory that appellants had an incentive to reduce their taxes by overstating losses and understating profits. One may agree to the incentive, but its existence wholly fails to establish the accuracy or reasonableness of the income taxed or of the method used to determine it. These "wins" were part and parcel of records showing

"losses" and cannot reasonably be considered separately from the complementarily shown "losses."

"Moreover, appellant May testified as to the method employed in recording the results of each day's operations, explaining that the figures were transferred from daily sheets to the more condensed summary indicating net wins and losses. The majority opinion assumes that these records were admissible as past recollections recorded, and yet there is no evidence that none of the losses thus shown was incurred. It is not necessary to establish that they occurred as recorded; for Mr. May's testimony, considered with the records, was sufficient to overcome the prima facie correctness of the Commissioner's determinations. The presumption in his favor upon which the judgments rest disappears when competent evidence to the contrary is introduced."

"In any event, I would hold that the prima facie correctness of the assessments made by the Commissioner was overcome when the manner in which they were made was disclosed, and also by the testimony of appellant May."

REASONS FOR GRANTING THE WRIT

This case obviously raises a question of great importance and with the sharp difference of opinion within the division hearing the case, and the divided decision upon the Petition for Rehearing In Banc, it is submitted this Court should examine the matter.

There is also a conflict between the United States Tax Court and this decision. This decision is also contrary to the decisions of other jurisdictions.

In *Dewey* v. *Hotchkiss,* 30 N.Y. 497, the Court held that after a defendant has availed himself of the plaintiff's books of account to establish certain credits in his favor, it is competent for the plaintiff to read from the same books

charges and entries which show that those credits have been exhausted by counter charges of debit, made at about the same time and afterwards.

The defendant can not use the books to establish credits in his favor, and uno flatu deny to the plaintiff the full benefit of the charges therein against him.

He must take the whole or none; and having elected to put the books in evidence, for his own benefit, he cannot afterwards be permitted to deprive the plaintiff of the benefit of any charges therein in his favor.

In *Cohan* v. *Commissioner,* 39 F. (2d) 540, 2d Cir., the facts were that Cohan in producing plays, entertained actors, employees and dramatic critics. These expenses amounted to substantial sums, but he kept no account of them and estimated that he had spent $11,000.00 in this fashion during the first six months of 1921. Commissioner disallowed this. The Court in reversing this finding said "But to allow nothing at all appears to us inconsistent with saying that something was spent. True, we do not know how many trips Cohan made, nor how large his entertainment; yet there was obviously some basis for compensation" . . . it was wrong to refuse any, even though it were traveling expenses of a single trip."

In this case we all know that a gambler cannot be in business without having some losses, but the Commissioner allowed him none.

In *Weaver* v. *Welsh,* 325 Pa. 571, 191 Atlantic 3, the Court said: "Appellant, to establish his right, read into the case those parts of appellee's answer in bidding receipt of the property, but objected to placing all the answer relative to the subject in evidence. This, of course, he could not do without opening the door to the full answer."

In *Rowan* v. *Chenowetch,* 49 W.Va. 287, 38 S.E. 544, the

Court said: "Under these principles the book would not be evidence for Chenowetch, as offered by his administrator, but the rule is that, when a party calls for the production of and uses a writing or account of his adversary, the whole writing, the whole account, debits and credits, is thus made evidence in the case. It cannot be garbled; one side or showing of it merely cannot be used for hurt of one party to the benefit of another."

Also see *Wigmore* Evidence, Sec. 2118 (3d ed. 1940): "The use of the whole of a ledger-account (or, in general, of all the items of account between the same parties in the same book or series of books) is open to the objection that the entries are not made at the same time but at different times, and that the case is therefore not precisely like a single oral statement or letter admitting a claim but asserting its discharge. In the latter instance it is easy to see that the intended tenor as a whole is a statement of non-liability, while in the former instance each entry admitting debit is usually at the time of making it a separate whole. Nevertheless, good sense has dictated that the whole of an account shall be taken together, whatever on strict logic might have been excluded."

See the dissenting opinion in *Showell* v. *Commissioner*, 238 F. 2d 148 (9th Cir. 1956).

In *Cullers* v. *Commissioner*, 237 F. 2d 611 (8th Cir. 1956), the Court said: "The presumption of correctness is a rebuttable presumption and will support a finding in favor of the Commissioner in the absence of any substantial evidence to the contrary. When the presumption has been overcome by evidence the presumption vanishes.

In 9 *Mertens, Law of Federal Income Taxation*, 50.71 (1958) legal presumptions are constantly being resorted to by the courts where facts are at issue. The presumption that the Commissioner's assessment of the tax is prima

facie correct means no more than that, in the absence of competent evidence to the contrary, his action will be upheld, but, once there is such contrary evidence, this presumption vanishes and the case is wide open. This presumption is what is often termed a "true" presumption and is not evidence itself, but merely shifts the burden of going forward with, as distinguished from the actual burden of, proof; and once the burden of going forward with the proof is met, it is as though the presumption has never existed. In other words, the effect of a presumption is little more than to cast upon the other party the burden of going forward."

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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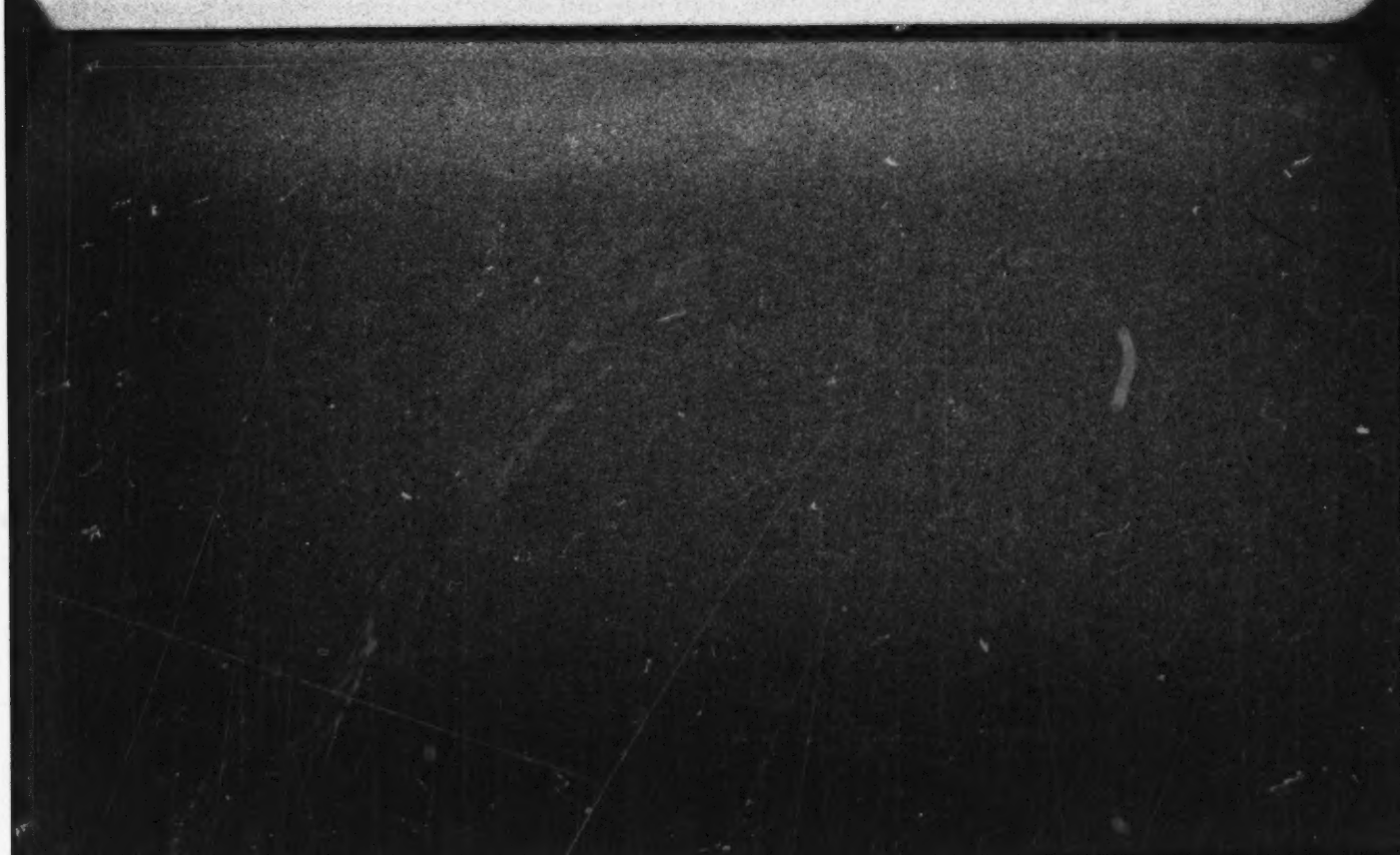
APPENDIX



APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16488

ABE PLISCO, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 16489

PERCY M. MAY, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 16490

NORMAN R. BAKER, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

Decided June 28, 1962

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,438
District Court Civil Action No. 887-58

ABE PLISCO, *Appellant*
v.
UNITED STATES OF AMERICA, *Appellee.*

No. 16,439
District Court Civil Action No. 2559-59
PERCY M. MAY, *Appellant*
v.
UNITED STATES OF AMERICA, *Appellee.*

No. 16,490
District Court Civil Action No. 3112-59
NORMAN BAKER, *Appellant,*
v.
UNITED STATES OF AMERICA, *Appellee.*

Before: WILBUR R. MILLER, *Chief Judge,* and EDGERTON, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN, BURGER, WRIGHT, *Circuit Judges,* in Chambers.

ORDER

On consideration of appellants' petition for rehearing en banc, it is

ORDERED by the court en banc that the petition for rehearing en banc is hereby denied.

Per Curiam.

Dated: July 30, 1962

Chief Judge MILLER, *Circuit Judge* FAHY, and *Circuit Judge* DANAHER vote to grant the petition.

Mr. H. Clifford Allder for appellants.

Mr. Robert L. Waters, Attorney, Department of Justice, of the bar of the Supreme Court of Alabama, *pro hac vice,* by special leave of court, with whom *Assistant Attorney General Oberdorfer, Messrs. David C. Acheson,* United States Attorney, *Lee A. Jackson* and *Joseph M. Howard,* Attorneys, Department of Justice, were on the brief, for appellee. *Mr. Charles T. Duncan,* Principal Assistant United States Attorney, and *Mrs. Caroline R. Just,* Attorney, Department of Justice, also entered appearances for appellee.

Before EDGERTON, BAZELON and FAHY, Circuit Judges.

BAZELON, *Circuit Judge:* This is a suit by the United States to reduce to judgment a jeopardy assessment resulting from the disallowance by the Commissioner of Internal Revenue of certain losses appellants claimed on their 1948, 1949 and 1950 income tax returns. Appellants were partners in a gambling enterprise. They computed each day's net profit or loss by subtracting the pay-outs and expenses from the day's winnings and recorded the result on their books. The Commissioner rejected the loss day figures, characterizing them as "self-serving," but accepted the daily profit figures as admissions against interest.

Unable to collect more than a fraction of the assessment by distraint, the Government brought this suit in the District Court to reduce the unpaid portion to judgment before it expired.[1] At trial, the parties stipulated that the Com-

[1] An assessment must be collected by levy or by a court proceeding within six years after the assessment is made. INT. REV. CODE of 1954 § 6502.

Appellants contend that, since the Government chose to collect this assessment by levying upon their property, § 6502 bars this action because it compels an election of remedies. Authority to bring a civil action to collect taxes is conferred by INT. REV. CODE of 1954 §§ 7401 and 7403. Sections 6331-44 govern seizure of property for collection of taxes. Nowhere in these sections does it appear that the Government must elect between the two remedies. Moreover,

missioner had made deficiency assessments for the years in question here. Appellants sought to introduce the daily records described above, but they were excluded on the Government's objection. Since assessments are deemed prima facie correct, and since appellants offered no other rebutting evidence, the court rendered judgment for the Government.[2] The taxpayers appealed.

We think the judgment must be affirmed. In reaching that result, we assume without deciding that the taxpayers' records were admissible as past recollections recorded since appellant May testified that he posted the entries daily and that they accurately reflected the day's operations. We also assume that appellants' failure to urge this ground of admissibility below does not bar consideration here.[3]

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§ 6502 was enacted as part of Subchapter A of Chapter 66 which deals solely with time limitations. We conclude that § 6502 limits the period, but not the means, for enforcing an assessment. *Cf. United States* v. *Havner*, 21 F.Supp. 985, 988 (S.D. Iowa 1937), *reversed on other grounds*, 101 F.2d 161 (8th Cir. 1939).

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[2] Appellants contend that the burden of proving the validity of the assessment was upon the Commissioner, plaintiff below. In the Tax Court and in suits for refund, the Commissioner's assessment is deemed prima facie correct. See generally 9 MERTENS, LAW OF FEDERAL INCOME TAXATION § 50.61 (1958); 10 *id.* §§58A.01, 58A.35 (1958); and cases cited therein. The same rule applies when the Commissioner seeks to reduce a jeopardy assessment to judgment. See *Becker* v. *United States*, 21 F.2d 1003 5th Cir. 1927); *Crook* v. *United States*, 30 F.2d 917 (5th Cir. 1929); *Paschal* v. *Blieden*, 127 F.2d 398 (8th Cir. 1952); 9 MERTENS, *supra* § 49.218.

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[3] But see *Janes* v. *Janes*, 51 App.D.C. 287, 278 Fed. 576 (1922).

But these records do not "clearly reflect income" within the meaning of INT. REV. CODE of 1954 § 446(b). Appellants' daily statements were not supported by memoranda of individual, verifiable transactions.[4] And their records contained no information concerning income and costs which might have enabled the Commissioner to verify the statements by comparing appellants' income-expense ratios with the ratios of similar enterprises. Without such data, the records reflect nothing more than the taxpayers' naked conclusions concerning the net taxable income or loss resulting from each day's operations. The Commissioner was not required to accept them.[5]

The statute provides that "If the method [of accounting] used does not clearly reflect income, the computation of taxable income shall be made under such method as, in the opinion of the [Commissioner] does clearly reflect income." INT. REV. CODE of 1954 § 446(b). Appellants contend that the Commissioner's reconstruction was arbitrary because he accepted their word as to daily profits but not as to daily losses.[6] We think, however, that since appellants had no incentive to overstate their daily profit figures in order

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[4] *Cf. O'Laughlin* v. *Helvering*, 65 App.D.C. 135, 81 F.2d 269 (1935). Our appellants recorded each incoming bet and the bettor's name on a slip of paper, and transferred the information thereon to so-called "20-line sheets" summarizing the day's operations. The slips and 20-line sheets were somewhat analogous to the sales memoranda and daily ledger of an ordinary business. Appellants destroyed them.

[5] *Stein*, 1962 P-H Tax Ct.Mem.Dec. ¶ 62019; *Nellis*, 24 P-H Tax Ct.Mem. 142 (1955), *affirmed*, 232 F.2d 890 (6th Cir. 1956). *Showell*, 23 T.C. 495 (1954); *reversed on other grounds*, 238 F.2d 148 (9th Cir. 1956), *on remand*, 26 P-H Tax Ct.Mem. 85 (1957), *reversed on other grounds*, 254 F.2d 461 (9th Cir. 1958), *on second remand*, 29 P-H Tax Ct.Mem. 30 (1960), *affirmed*, 286 F.2d 245 (9th Cir. 1961); *Bickers*, 29 P-H Tax Ct.Mem. 491 (1960).

[6] Though appellants have the burden of proof, they need not show the amount that should have been assessed. They need only show that the Commissioner's assessment was arbitrary and capricious. *Helvering* v. *Taylor*, 293 U.S. 507 (1935).

to increase their taxes, the Commissioner could reasonably accept these figures as minima. On the other hand, since appellants did have an incentive to overstate their daily loss figures in order to reduce their taxes, the Commissioner could reasonably reject these figures in the absence of any data which would provide a basis for testing their reasonableness.

Nor can we agree with appellants that *Cohan* v. *Commissioner*, 39 F.2d 540 (2d Cir. 1930), requires the Commissioner to make some estimate of allowable losses for the days they allege their operations were unprofitable. In *Cohan* the Second Circuit directed the Tax Court to estimate the entertainment expenses of a theatrical manager and producer even though he had not recorded them. The court reasoned that he must have incurred such expenses and that it would be arbitrary to disallow them altogether. But Cohan kept reliable gross income records. Hence the order of magnitude of the entertainment expenses he incurred could be inferred and a meaningful estimate made. Here there are no reliable figures from which to calculate or extrapolate a reasonable estimate of appellants' losses and expenses. Hence we think *Cohan* is inapposite.[7]

Appellants might have brought themselves within the rule of the *Cohan* case had they provided gross income figures. Thus, in *Simon*, 24 P-H Tax Ct.Mem. 1059 (1955), the Commissioner disallowed the losses of a professional gambler who had recorded each day's gross wagers and pay-outs. The Commissioner argued that since the losses could not be verified, they must be disallowed altogether. But the Tax Court held that it would be arbitrary to assume that Simon had incurred no losses and estimated them based upon a percentage of the gross bets placed.[8]

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[7] *Stein, supra* note 5; *Nellis, supra* note 5. Contra: *Showell, supra* note 5; *Bickers, supra* note 5. *But see Drews*, 25 T.C. 1354 (1956).

Appellants might also have rebutted the Commissioner's computation by reconstructing their own income by the net worth method. Such a reconstruction, not dependent upon adequate business records, is illustrated by the *Willis* case.[9] Willis kept no records of his seafood distributing business, so the Commissioner reconstructed Willis' income by taking a percentage of his gross shipments. But Willis rebutted the presumption in favor of the Commissioner's assessment by evidence that his standard of living and the debts which he incurred during the period under review were inconsistent with the income the Commissioner attributed to him.[10]

Since appellants provided no information which would enable the Commissioner to compute their income on a different basis from the one he chose,[11] we cannot say that he acted arbitrarily.

Affirmed.

FAHY, *Circuit Judge dissenting:* Appellants were partners engaged in operating a gambling enterprise. Deficiency assessments were entered against them for federal income taxes for the years 1948, 1949 and 1950, in

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[8] Accord: *Mesei*, 25 T.C. 513 (1955), *reversed and remanded on other grounds*, 242 F.2d 558 (7th Cir. 1957), *affirmed on other grounds sub nom. Commissioner v. Sullivan*, 356 U.S. 27 (1958). Semble: *Hackerman*, 23 P-H Tax Ct.Mem. 484 (1954), *affirmed per curiam*, 229 F.2d 959 (6th Cir. 1955). See also *Delsanter*, 28 T.C. 845 (1957), where the Tax Court approved an estimate based upon an extrapolation of gross wagers from verifiable records of wages paid employees of a gambling casino.

[9] 26 P-H Tax Ct.Mem. 857 (1957).

[10] Semble: *Dean*, 24 P-H Tax Ct.Mem. 718 (1955). See also *Holland v. United States*, 348 U.S. 121 (1954).

[11] "The Commissioner's reconstruction of income wil lbe persumed correct with the burden on the taxpayer to disprove his crude computation." 2 MERTENS, FEDERAL INCOME TAXATION § 12.12 at 40 (1961) (citing authorities).

Appellants could also have rebutted the presumption of validity accorded the Commissioner's assessment by the cash expenditures or by the bank deposit method. *See generally*, 2 MERTENS, FEDERAL INCOME TAXATION § 12.12 (1961).

the amount of $412,729.87 applicable to Plisco, $309,740.33 applicable to Baker, and $324,933.69 applicable to May.[1] With interest the judgments entered on these assessments are, respectively, $614,551.46, $474,397.38, and $497,437.99. There is no satisfactory evidence that these men owe these large sums to the United States, and so I cannot agree to affirm the judgments.

For the years in question each appellant reported as his individual share an amount of income from the partnership, and paid the income tax on the amount reported. As derived from gambling for the three-year period, $56,607.23 was reported by Plisco, $43,261.49 by May and $43,261.49 was attributed to Baker.

It is no doubt true that appellants failed to maintain adequate records; but the cases before us are not for violation of any statute or regulation respecting records,[2] or for violation of the gambling laws. The question is whether appellants owe the United States the amounts of the judgments.

The grounds advanced to support the assessments on which the judgments rest, as I understand the majority opinion, are that the Commissioner assessed deficiencies in amounts which appellants' records revealed as "net wins" for each day, and although these same records indicated "net losses" the Commissioner could disregard all such claimed losses since they were not substantiated by

[1] The United States, proceeding under distraint warrants, had, in 1952 and 1954, levied upon certain assets of Plisco, realizing $11,984.65, which was credited to his deficiency for 1948. Payments of $40 and $30 were received from May in 1955. No amounts have been obtained from Baker.

[2] I note that the Commissioner has imposed negligence penalties against the appellants. These may be levied for failure to maintain adequate records. See *Stein*, 1962 P-H Tax Ct.Mem. ¶ 62,019; *Bickers*, 29 P-H Tax Ct.Mem. ¶ 60,083 (1960). And see Int. Rev. Code of 1954, § 6653(a).

appellants. Since deficiency assessments are deemed to be prima facie correct it is considered that the Government proved its case in the District Court merely by introducing in evidence the assessments arrived at in this manner.

The difficulty with the above is that the assessments thus given controlling effect are based entirely on records which also indicate substantial gambling losses, none of which were taken into account. I think the United States may not thus choose and reject from the same records. The parts chosen have no more trustworthiness than the parts rejected. *Cf. Dewey* v. *Hotchkiss,* 30 N.Y. 497, 499-501 (1864); *Weaver* v. *Welsh,* 325 Pa. 571, 574-75, 191 Atl. 3, 6 (1937); *Rowan* v. *Chenoweth,* 49 W. Va. 287, 292-93, 38 S.E. 544, 546 (1901); Wigmore, *Evidence* § 2118 (3d ed. 1940). And see *Showell* v. *Commissioner,* 238 F.2d 148, 153-55 (9th Cir. 1956) (dissenting opinion).

I also think it is inaccurate to say that the assessments result from the disallowance of alleged gambling losses which were not substantiated. This is not the situation. The assessments result from taking these taxpayers' own records, accepting completely the wins shown thereby and disregarding entirely the losses, except losses accounted for by the taxpayers in reaching net wins. This is to me indeed an unreliable and arbitrary method by which to obtain these judgments. The method shown to have been used destroys the prima facie correctness of the result. The majority opinion itself states the records referred to "do not 'clearly reflect income' within the meaning of INT. REV. CODE of 1954 § 446(b) . . . the records reflect nothing more than the taxpayers' naked conclusions concerning the net taxable income or loss resulting from each day operations. The Commissioner was not required to accept them." Yet the Commissioner did not disregard them. These

very records are the sole basis for the amounts of the assessments. The majority opinion somehow seeks to overcome this difficulty by accepting the wins shown by these unacceptable records, as if they show the income, relying on the theory that appellants had an incentive to reduce their taxes by overstating losses and understating profits. One may agree to the incentive, but its existence wholly fails to establish the accuracy or reasonableness of the income taxed or of the method used to determine it. These "wins" were part and parcel of records showing "losses" and cannot reasonably be considered separately from the complementarily shown "losses."

Moreover, appellant May testified as to the method employed in recording the results of each day's operations, explaining that the figures were transferred from daily sheets to the more condensed summary indicating net wins and losses. The majority opinion assumes that these records were admissible as past recollections recorded, and yet there is no evidence that none of the losses thus shown was incurred. It is not necessary to establish that they occurred as recorded; for Mr. May's testimony, considered with the records, was sufficient to overcome the prima facie correctness of the Commissioner's determinations. The presumption in his favor upon which the judgments rest disappears when competent evidence to the contrary is introduced. *Cf. Gersten* v. *Commissioner,* 267 F.2d 195, 199 (9th Cir. 1959); *Cullers* v. *Commissioner,* 237 F.2d 611, 614 (8th Cir. 1956); *Showell* v. *Commissioner, supra* at 153-55; 9 *Mertens, Law of Federal Income Taxation* § 50.71 (1958).

Aside from the foregoing, it seems that the principle of *Cohan* v. *Commissioner,* 39 F.2d 540, 543-44 (2d Cir. 1930), is also applicable. The reason advanced by the majority for a contrary position is that appellants failed to produce any reliable figures from which an estimate of

losses could be made. Appellants must have sustained some losses and incurred some expense during the three-year period, other than those considered in arriving at net wins. In *Bickers, supra* note 2, in somewhat similar circumstances, the Tax Court used its "best judgment" in determining wagering losses which had been entirely excluded by the Commissioner for lack of substantiation, and see *Drews,* 25 T.C. 1354 (1956), where, however, there was testimony, which the Tax Court accepted, that there were some losses. *Cf. Stein, supra* note 2.

In any event, I would hold that the prima facie correctness of the assessments made by the Commissioner was overcome when the manner in which they were made was disclosed, and also by the testimony of appellant May.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 562

ABE PLISCO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 23–27) [1] is reported at 192 F. Supp. 337. The opinion of the court of appeals (Pet. 11–19) is reported at 306 F. 2d 784.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1962. A petition for rehearing *en banc* was denied on July 30, 1962 (Pet. 9–10). The petition for a writ of certiorari was filed on October 26, 1962. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254.

[1] Record references made in this manner are to the pages of the Joint Appendix which constituted the printed record in the court of appeals, now part of the record in this Court.

QUESTIONS PRESENTED

1. Whether the method employed by the Commissioner in determining tax deficiencies against the petitioners was so arbitrary as to vitiate the presumptive correctness of the determination.

2. Whether the trial court must make an estimate of allowable gambling losses in excess of those previously allowed by the Commissioner where there is no finding that any such additional losses occurred.

3. Whether the court of appeals erred in holding that records offered by the petitioners were not sufficiently credible to overcome the presumptive correctness of the Commissioner's determination.

STATEMENT

The United States brought suits against each of the taxpayers (petitioners here) in the United States District Court for the District of Columbia to reduce to judgment assessments for income taxes for the years 1948, 1949 and 1950; the three suits were consolidated for trial (R. 23). During those years the taxpayers were engaged in a gambling enterprise as partners (Pet. 11; R. 23). The assessments resulted from the disallowance by the Commissioner of certain alleged gambling losses. The alleged losses disallowed were those claimed to have resulted in a net loss from gambling on a particular day (Pet. 11). Losses were allowed to the extent of gains on a daily basis (Pet. 17).

The unpaid balances due and owing on the various assessments were established in the pretrial proceedings (R. 20–21). At the trial the United States

introduced no additional evidence and relied on the claim that these assessments created a *prima facie* case that the deficiencies were correct, though subject to rebuttal by the taxpayers (R. 32). Percy May, one of the taxpayers, and the sole defense witness, identified certain exhibits (Deft. Ex. 1, 2, 3) as being the only records of the partnership's gambling activities. He testified that he had personally maintained the records, recording for each day of the years in question one figure which was the daily net gain or loss of that day for the partnership (R. 35). He also testified that memoranda of individual gambling transactions were made, but that these records were destroyed daily to avoid incrimination (R. 42). Petitioners offered the exhibits in evidence as records made in the regular course of business (R. 43–44). Objection was made that they were not the best evidence and that they were not original entries (R. 43). After receiving briefs on the issue (R. 48), the court held that the exhibits were not admissible as business records. Since the exclusion of the exhibits left the taxpayers without evidence to rebut the *prima facie* case established by the assessments, judgment was rendered in favor of the United States for the total amount of the deficiencies (R. 27–28).

The court of appeals affirmed, one judge dissenting, holding that the manner in which the deficiencies were determined did not vitiate the presumptive correctness of the determination.[2] It held further that

[2] It was assumed by the majority and the dissent in the court of appeals (see Pet. 16–17), and the government here concedes, that the assessments were determined on the basis of the daily one-line records kept by petitioners.

the taxpayers' records, assuming they were admissible evidence, were insufficient to rebut the presumptive correctness of the deficiency determinations and that there was no error in the district court's failure to make an estimate of losses beyond those previously allowed by the Commissioner (Pet. 13–15).

ARGUMENT

The only question presented in this case concerns the inferences to be drawn from the way in which the taxpayers kept records of their gambling wins and losses. There is no conflict of decisions and the case is of no general importance.

1. The determination of the Commissioner of Internal Revenue in assessing taxes is presumptively correct, and is sufficient of itself to establish a *prima facie* case that the amount of taxes so assessed is due the United States. See *United States* v. *Rindskopf*, 105 U.S. 418. Admittedly, the presumption can be countered by a showing that the Commissioner's determination is arbitrary and excessive. Cf. *Helvering* v. *Taylor*, 293 U.S. 507. But we dispute taxpayers' contention that the manner in which the Commissioner's determination was made in this case is so lacking in rationality that it should have been rejected as arbitrary and excessive.

The taxpayers maintained a system of records which revealed only one figure as a daily result of their gambling enterprise. The figure for each day was either a net win or net loss for the day, with no indication of the gross volume of gambling transactions handled. The Commissioner used the daily net

win figures in making his assessment. He disallowed the purported net losses, computed on a daily basis.[3] The court of appeals, in holding that this factor of itself did not show the determination to be arbitrary and excessive, said (Pet. 13–14):

> We think, however, that since appellants had no incentive to overstate their daily profit figures in order to increase their taxes, the Commissioner could reasonably accept these figures as minima. On the other hand, since appellants did have an incentive to overstate their daily loss figures in order to reduce their taxes, the Commissioner could reasonably reject these figures in the absence of any data which would provide a basis for testing their reasonableness.

The taxpayers have cited no authority in conflict with this holding.[4] Cf. *Showell* v. *Commissioner* 23 T.C. 495, reversed on other grounds, 238 F. 2d 148 (C.A. 9). This action, involving an administrative determination, cannot be characterized as arbitrary particularly when the burden always rests on the taxpayer to substantiate the amount of his claimed deductions. See *Burnet* v. *Houston*, 283 U.S. 223; *Helvering* v. *Taylor, supra.*

2. The taxpayers argue that *Cohan* v. *Commissioner*, 39 F. 2d 540 (C.A. 2), required the district court

[3] The taxpayers state that the Commissioner allowed them no losses in making his determination (Pet. 6), but this is contrary to the facts accepted by the court of appeals (Pet. 11, 17).

[4] Cases such as *Dewey* v. *Hotchkiss*, 30 N.Y. 497, relied on by the taxpayers (Pet. 5) have no bearing on this issue. Those cases announce a rule of evidence and are hardly appropriate authority for judging the rationality of this administrative determination.

to make an estimate of losses in addition to those allowed by the Commissioner. That case established the principle (*id.* at 544) that where the fact-finder determined that a deductible expense had been incurred, but the taxpayer was unable to prove the amount thereof, an approximation should be made, "bearing heavily if it chooses upon the taxpayer whose inexactitude is of his own making." Since there is no finding here that any gambling losses in excess of those allowed by the Commissioner had been sustained, no approximation was required. *Chesbro* v. *Commissioner*, 225 F. 2d 674 (C.A. 2).

3. The court of appeals assumed, without deciding, that the records proffered as evidence, but refused admission by the district court, could properly have been received.[5] Notwithstanding this assumption the

[5] The court of appeals assumed that the records could have been received as a record of the past recollection of the witness, May (Pet. 12). This ground of admissibility was not open to the taxpayers on appeal, however, since, to obviate the apparent hearsay objection, they had offered the exhibits as business records under 28 U.S.C. 1732. (The district court properly held that the business records exception did not apply, citing *Palmer* v. *Hoffman*, 318 U.S. 109 (R. 23–27).) Where proffered evidence is subject to a general exclusionary rule, the proponent must point out a proper exception and cannot put the trial court in error by pointing out a valid, but different, exception for the first time on appeal. See *Janes* v. *Janes*, 278 Fed. 576 (C.A.D.C.); *Rothwell* v. *First Nat. Bank of Boston*, 286 Mass. 417, 190 N.E. 812; *Weller* v. *Fish Transport Co.*, 123 Conn. 49, 192 Atl. 317; *Johnson* v. *Rockaway Bus Corp.*, 145 Conn. 204, 140 A. 2d 708; cf. *Smith* v. *Shoemaker*, 17 Wall. 630; *Standard Oil Co. of California* v. *Moore*, 251 F. 2d 188, 217 (C.A. 9th).

Beyond this, however, the records could not properly be received as a recorded past recollection which, like any testi-

court of appeals held that the records were not of sufficient probative value to rebut the *prima facie* case made by the assessments. The rebuttable presumption of correctness attending the Commissioner's determination is not evidence, but the *prima facie* case established by the presumption will prevail in the absence of substantial evidence to the contrary. *Cullers* v. *Commissioner,* 237 F. 2d 611 (C.A. 8). It is not overcome by inherently improbable testimony, even though that testimony be uncontradicted. *O'Laughlin* v. *Helvering,* 81 F. 2d 269 (C.A. D.C.).

The records in this case are an alleged summation of numerous memoranda that were the actual records of taxpayers' gambling transactions. Those memoranda had been systematically destroyed to avoid incrimination. The net-figure summation is devoid of any possibility of internal check and contains no information from which verification could be made by reference to other sources. Although perhaps the product of daily entry, these figures lack all the earmarks of trustworthiness that lend credibility to ordinary business records. Moreover, the district court concluded that the records in question had been maintained for the purpose of providing

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mony, is subject to the normal rules of evidence which require firsthand knowledge and the like. It was shown that the net-figure summation resulted from a daily computation of all payouts made—not just the gambling payouts. As a result, the net figure was no more than the declarant's assertion of the daily net taxable income of the partnership (Pet. 13). This, of course, is a conclusion of law to which the witness was not competent to testify by either present memory or past recollection recorded.

some documentary support for the taxpayers' dealings with the Internal Revenue Service (R. 27). The court of appeals properly held that such records were not credible enough to overcome the *prima facie* case made by the government.*

CONCLUSION

We respectfully submit that the petition for writ of certorari should be denied.

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NOVEMBER 1962.

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* The court noted that petitioners could have rebutted the presumption of validity accorded the Commissioner's assessment "by the cash expenditures or by the bank deposit method. *See generally*, 2 Mertens, Federal Income Taxation § 12.12 (1961)" (Pet. 15).

U.S. GOVERNMENT PRINTING OFFICE: 1962